No. 76-1210

In the Supreme Court of the United States

OCTOBER TERM, 1976

JOHN BALLESTRASSE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on January 31, 1977. The petition for a writ of certiorari was filed on March 2, 1977. The jurisdiction of this court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the district court erred in admitting rebuttal evidence to impeach petitioner's testimony.

2. Whether, in the circumstances of this case, petitioner was denied a fair trial because he was cross-examined about

whether he had been accompanied by counsel when he appeared before the grand jury.

3. Whether the district court's instructions adequately informed the jury that its verdict had to be unanimous.

STATEMENT

After a jury trial in the United States District Court for the Northern District of California, petitioner was convicted on two counts of making a false statement before a grand jury, in violation of 18 U.S.C. 1623. He was sentenced to concurrent terms of one year and one day's imprisonment. The court of appeals affirmed (Pet. App. A).

The evidence at trial showed that Lonnie Murray was arrested on March 20, 1968, for possession of heroin with intent to distribute it (Tr. 137, 143). Murray offered money to the arresting officer and asked if something could be done about his case. The officer replied that someone would contact him the following day. That evening Murray was released on bail, which had been provided by petitioner, a bail bondsman in San Francisco (Tr. 137). The next day petitioner met with Murray and stated that his case could be taken care of for $6,000 (Tr. 138-139). Murray immediately paid petitioner that amount and, at petitioner's request, subsequently gave petitioner an additional $3,000. In return, petitioner promised to arrange for Murray to be sentenced either to a maximum of one year in the county jail or to probation (Tr. 139-140).

On September 30, 1970, Joseph "Billy" Ethridge and four other persons were arrested for narcotics violations (Tr. 21, 59-60). Upon their release on bail provided by petitioner, Ethridge and the others went to petitioner's office, where Ethridge inquired how much it would cost to fix the case

(Tr. 61-63). Petitioner stated that it could be fixed for $7,000 (Tr. 63). The price was thereafter reduced to $2,500, which Ethridge gave to petitioner in return for petitioner's agreement to obtain dismissal of the charges (Tr. 66-68). Some time later Ethridge, as an added precaution, also paid Welsh Long $2,500 or $3,000 to fix his case (Tr. 68-69, 98-99). When Long informed petitioner of this payment, petitioner stated that he would take care of the matter and told Long to leave the case alone (Tr. 99-100).

In March, April, and June 1975, petitioner appeared before a federal grand jury that was investigating the alleged bribery of police officers and their failure to enforce the narcotics laws (Tr. 11). Specifically, the grand jury was attempting to determine whether a conspiracy existed among narcotics officers and others in which the officers were receiving money for the purpose of fixing the cases of persons arrested for drug offenses. In his testimony before the grand jury, petitioner falsely denied talking to Ethridge or anyone else about fixing his case, telling Long that he would take care of Ethridge's case, or receiving $9,000 in return for offering to fix Murray's case (Tr. 209-211).

ARGUMENT

1. Although petitioner testified on direct examination at trial that he had discussed fixing cases with clients and had taken money from some of those individuals, he denied that he had ever discussed fixing a case with police officers or had ever actually fixed a case (Tr. 292-293). On cross-examination, petitioner stated that if a client sought to have his case fixed, he might discuss with the police officer the possibility of obtaining leniency if the client were to become an informant or were to return contraband (Tr. 350-351). In addition, petitioner unequivocally denied that he had attempted to fix a case on behalf of Gus Foundas or that he had ever spoken to Foundas about fixing his case (Tr. 362-365).

To rebut these assertions, the government called Foundas, who testified that Tony Ballestrasse, petitioner's cousin, had told him that he could have the case against Foundas fixed for $1,000 (Tr. 389-390, 393). The government also played a recorded telephone conversation about the case in which petitioner told Foundas, "Well, we're trying to get something going, but it's tough. Hey, nobody wants to touch it" (Tr. 396).

Petitioner contends (Pet. 5-7) that the district court erred in allowing the introduction of the government's rebuttal evidence, alleging that Foundas' testimony was irrelevant to the charges against him and that the testimony was inadmissible because it impeached statements that had been elicited on cross-examination. Petitioner did not object to this evidence at trial, however, and he therefore must demonstrate not only that the trial judge abused his discretion but also that the ruling constituted plain error. Fed. R. Crim. P. 52(b).[1]

The court of appeals correctly concluded (Pet. App. 2-3) that petitioner's claims are insubstantial. The mode and order of presenting evidence are within the reasonable control of the district court (Fed. R. Evid. 611(a)) and there is no general rule barring the introduction of evidence, not collateral to the issues in the case, in order to rebut testimony given during cross-examination. See *McCormick on Evidence* §47, p. 99 (2d ed. 1972). Foundas' testimony indicated that petitioner had engaged in past attempts to fix criminal cases. Hence, it was strong circumstantial evidence that he similarly had tried to fix Ethridge's and Murray's

[1]Petitioner's "timely objection" (Pet. 7, n. 3) was based upon an evidentiary matter wholly unrelated to the issue presented here (Tr. 389).

cases and that he had lied about these matters in his grand jury testimony.

Contrary to petitioner's contention (Pet. 7), the decision below does not conflict with *United States* v. *Mariani*, 539 F. 2d 915 (C.A. 2). In *Mariani*, the court held that illegally seized evidence, not admissible as part of the government's case-in-chief, could not be used to impeach a defendant about matters beyond the scope of his direct examination. 539 F. 2d at 923-924. Here, however, Foundas' testimony was not tainted and could have been introduced as part of the government's direct case in order to prove petitioner's criminal intent and to dispel the notion that his false answers were a mistake or accident. See Fed. R. Evid. 404(b); *United States* v. *Calvert*, 523 F. 2d 895, 911-912 (C.A. 8), certiorari denied, 424 U.S. 911; *United States* v. *Trapnell*, 495 F. 2d 22, 25 (C.A. 2), certiorari denied, 419 U.S. 851.

2. Petitioner asserts (Pet. 7-11) that his Fifth and Sixth Amendment rights were violated by the prosecutor's "repeated reference" during cross-examination to the fact that petitioner retained and consulted counsel before and during his appearance in the grand jury. Again, however, petitioner failed to object to this questioning (Tr. 311-312, 356-357, 360), and the claim does not amount to plain error. As the court of appeals observed (Pet. App. 3), petitioner testified at trial that he was alone, scared, and confused when he appeared in the grand jury (Tr. 356). This testimony obviously was designed to convince the jury that any inaccuracies in petitioner's grand jury testimony were the product of nervousness or confusion—a point that his counsel reiterated on summation (Tr. 478-479). Reference to petitioner's legal representation at the time of his appearance was admissible to rebut that contention and to establish that petitioner made the false statements alleged in

the indictment with criminal intent, which was an element of the offense.[2]

Grunewald v. *United States*, 353 U.S. 391, does not require a different result. There, the Court held that it was error to permit the defendant to be cross-examined about his assertion of the privilege against self-incrimination before the grand jury, in light of the minimal probative value and potential for extreme prejudice in such questioning. See *Doyle* v. *Ohio*, 426 U.S. 610, 616-620; *United States* v. *Hale*, 422 U.S. 171, 177-180. As noted above, however, petitioner's frequent consultation with his attorney prior to and during his grand jury testimony was unquestionably probative, since it tended to establish that his false statements were intentional and it rebutted his trial testimony that he had been "scared to death of the grand jury. [I was] up there all by myself and I didn't know what the hell was going on" (Tr. 356). Furthermore, unlike the disclosure that a defendant once refused to answer a question out of fear of incriminating himself, the fact that a defendant consulted counsel before testifying before the grand jury does not suggest that he may be guilty of a crime. As the Seventh Circuit recently observed in rejecting a similar argument (*United States* v. *Kopel*, C.A. 7, No. 76-1601, decided April 19, 1977, slip op. 7):

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[2]Petitioner correctly notes that one of the prosecutor's references occurred prior to his testimony that he was confused and alone during his grand jury appearance (Tr. 311-312). Since the later references were admissible, however, any impropriety in the earlier questions about the same matter was harmless beyond a reasonable doubt. See, *e.g.*, *In re Penn*, 443 F. 2d 663, 666 (C.A. D.C.). The jury's discriminating verdict—finding petitioner not guilty on two of the four counts, all of which were based on his testimony before the same grand jury—indicates that these brief colloquies were not significant, a fact that is further underscored by petitioner's failure to object to the questions at trial.

> [We] cannot agree with the defendant's implied assertion that laymen would view a putative defendant's use of counsel in a grand jury appearance as a "badge of guilt." While the Supreme Court in *Ullman* v. *United States*, 350 U.S. 422, 426 (1956), asserted that too many Americans viewed the Fifth Amendment privilege as a "shelter for wrongdoers," it has never found such widespread misunderstanding regarding the Sixth Amendment guarantee of effective assistance of counsel. Certainly today, when the layman frequently views our criminal justice system as being confusing and complex, consultation with an attorney is not tantamount to an admission of involvement or guilt.

3. Petitioner contends (Pet. 12) that the district court's instructions inadequately informed the jury that its verdict on Count One of the indictment had to be unanimous. Count One contained four specifications of perjury, all of which related to petitioner's denials that he had ever discussed fixing Ethridge's case with anyone. Petitioner asserts that because the jury was instructed only that its verdict must be unanimous, the jury may have found him guilty on Count One without agreeing on which particular statement was false.[3]

Petitioner's claim relates solely to Count One of the indictment. Because he received concurrent sentences on that count and on Count Four, the Court need not consider the issue. *Barnes* v. *United States*, 412 U.S. 837,

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[3]Petitioner does not challenge the validity of the inclusion of more than one allegedly false statement in a single count. See Rule 7(c), Fed. R. Crim. P.; *United States* v. *Bonacorsa*, 528 F. 2d 1218, 1221 (C.A. 2), certiorari denied, 426 U.S. 935; *United States* v. *Edmondson*, 410 F. 2d 670, 673, n. 6 (C.A. 5), certiorari denied, 396 U.S. 966.

848, n. 16. Moreover, since petitioner neither objected at trial to the district court's charge to the jury, nor proposed additional instructions to remedy the alleged defect, he is foreclosed from raising the claim at this stage of the proceedings. See Fed. R. Crim. P. 30; *Vitello* v. *United States,* 425 F. 2d 416, 423 (C.A. 9), certiorari denied, 400 U.S. 822.

In any event, there is nothing to petitioner's assertions. The jury was instructed that, as to those counts containing more than one allegedly false statement, a conviction could be sustained on proof that any one such statement was perjured (Supp. Tr. II, p. 9). The jury was also instructed that its verdict had to be unanimous (Tr. 501). Those instructions were sufficient, for "[i]t is assumed that a general instruction on the requirement of unanimity suffices to instruct the jury that they must be unanimous on whatever specifications they find to be the predicate of the guilty verdict." *United States* v. *Natelli,* 527 F. 2d 311, 325 (C.A. 2), certiorari denied, 425 U.S. 934. See also *Vitello* v. *United States, supra,* 425 F. 2d at 422-423; *United States* v. *Armone,* 363 F. 2d 385, 398 (C.A. 2), certiorari denied, 385 U.S. 957.

Yates v. *United States,* 354 U.S. 298, *Stromberg* v. *California,* 283 U.S. 359, and the remaining cases cited by petitioner (Pet. 12) have nothing to do with the requirement that the jury's verdict be unanimous. Each holds that when a case has been submitted to the jury on alternative theories, the resulting conviction must be set aside if one or more of those theories is constitutionally invalid. Petitioner does not challenge the validity of his conviction as to any of the specifications of perjury in Count One, nor could he, in light of the substantial evidence of falsity of each of those statements. See *United States* v. *Natelli, supra,* 527 F. 2d at 325.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 1977.